LIBRARY
SUPREME COURT, U. S.

No. 73-366

Supreme Court, U. S.
FILED
AUG 28 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

BURTON SANFORD WOLCOFF, ROBERT ALLEN WOLCOFF and DOREE CREWS WOLCOFF,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAYMOND J. SMITH
33 North Dearborn Street
Chicago, Illinois 60602
Attorney for petitioners.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Judgment and Opinion of the Court Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Reasons for Granting Writ 7

1. The charges and evidence in this case erroneously extended the scope of the crime of conspiracy where the Government's proof established that a specifically named co-conspirator/bribee did not conspire with the defendants to be influenced in his official duties 7

2. Under Rule 18 of the Federal Rules of Criminal Procedure, venue is not established in substantive counts where only the acts of an accessory occurred in the prosecuting district and in the conspiracy count where no acts of a convicted defendant occurred in such district 9

Conclusion 14

Appendices:

A. Opinion and Order of U.S. Court of Appeals affirming judgments of District Court .....App. 1

B. Order denying Petition for Rehearing .....App. 6

Authorities Cited

PAGE

Kotteakos v. U.S., 328 U.S. 750 (1946) 9

U.S. v. Bohle, 445 F.2d 54 (C.A. 7th, 1971) 10

U.S. v. Bozza, 365 F.2d 206 (2nd Cir., 1966) 11

U.S. v. Flaxmore, 304 F.Supp. 1301 (D.C. N.Y., 1969) 11

U.S. v. Green, 309 F.2d 852 (C.A. 5th, 1962) 11, 12, 13

U.S. v. Irwin, 350 F.2d 192 (2nd Cir., 1965) 8

U.S. v. Mischlick, 310 F.Supp. 669 (D.C. N.J., 1970) 11

U.S. v. Sweig, 316 F.Supp. 1148 (D.C. N.Y., 1970) 11

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

BURTON SANFORD WOLCOFF, ROBERT ALLEN WOLCOFF and DOREE CREWS WOLCOFF,

Petitioners,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable The Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioners, Burton Sanford Wolcoff, Robert Allen Wolcoff and Doree Crews Wolcoff, pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated July 12, 1973, affirmed the judgment of conviction. The opinion and Order of the Court of Appeals is reprinted as Appendix A, *infra*. A Petition for Rehearing was timely filed but was denied by Order dated July 27, 1973, which Order is reprinted as Appendix B, *infra*.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the charges and evidence in this case erroneously extended the scope of the crime of conspiracy where the Government's proof established that a specifically named co-conspirator bribee did not conspire with the defendants to be influenced in his official duties.

2. Whether, under Rule 18 of the Federal Rules of Criminal Procedure, venue is established in substantive counts were only the acts of an accessory occurred in the prosecuting district and in the conspiracy count where no acts of a convicted defendant occurred in such district.

STATEMENT OF THE CASE.

In December, 1967, the defendants, Burton Sanford Wolcoff and Robert Allen Wolcoff, were sent to the Terre Haute Penitentiary, Terre Haute, Indiana, to serve a five-year sentence for mail fraud. The first Saturday that these two defendants were at Terre Haute, they attended the religious services for the Jewish congregation at the Penitentiary, and there met Chaplain Rabbi Bernard M. Cohen. (R. 58) Every Saturday for the next 2½ years, Rabbi Cohen talked with the Wolcoffs and the rest of the Jewish congregation after services at the Chapel.

Rabbi Cohen testified that in December, 1967, he became aware that Burton Sanford Wolcoff was "and I do not know that he is not still—an overt asthmatic with all of the symptoms of an asthmatic patient person, heavy, hard breathing and all of the other physical stresses and strains of a person who is under that physical and psychological status. So that when these occasions arose his physical condition, his demeanor physically was such that I as a Clergyman couldn't help but react to it." (R. 123-124) Rabbi Cohen testified that in December, 1967, at times when Burton Wolcoff was showing signs of this asthmatic condition:

> "Burton had said to me that he had an urgent need to make a telephone conversation with his wife demonstrating stress and strain—" (R. 106)

Rabbi Cohen granted Burton Wolcoff's request and made a collect telephone call in mid-December, 1967, to Burton's wife, the defendant Doree Crews Wolcoff. Approximately every four or five weeks thereafter (altogether 12 calls), Rabbi Cohen made collect calls to Mrs. Wolcoff and allowed Burton to speak with his wife. These calls were only

made when "the occasion arose that the need to make the call arose." (R. 104) Rabbi Cohen testified that during each of these telephone calls, Burton Wolcoff expressed his health problems and "he extended to her the need to have her visit him at a specific time." (R. 113) The rest of the conversation dealt with " 'how are the children', the usual basic how-are-you." (R. 114) During some of these calls, Robert Allen Wolcoff was "probably" present. (R. 78)

Rabbi Cohen testified that he didn't know whether or not there were any guidelines at the Penitentiary for allowing the prisoners to make calls. (R. 120)

In April of 1968, some five months after the original calls were placed to Mrs. Doree Crews Wolcoff, Rabbi Cohen's son's medical problem required a trip to Chicago. (R. 65) After the regular religious services on the Saturday prior to that trip, Rabbi Cohen announced to his congregation that there would be no services the following Saturday as he was going to Chicago. (R. 68-69) Rabbi Cohen testified that after the service "it was suggested by Burton that I should stay with my son at the Continental Plaza. I thought it was very gracious. I asked why. And he responded that I had been so nice to them and kind to the men that I might be their guest." (R. 72) Rabbi Cohen did travel to Chicago with his son and stayed at the Continental Plaza for two days, and this hotel bill was paid for by the check of Mrs. Doree Crews Wolcoff. In October, 1968, Mrs. Wolcoff paid another hotel bill of the Rabbi and gave him a watch. (R. 169, 170)

After mid-March, 1968, Rabbi Cohen placed two non-institutional phone calls from his office in the City of Terre Haute to Marty Wolcoff, the wife of Robert Allen Wolcoff.

(R. 128, 216) On these two occasions, the conversations were only between Rabbi Cohen and Mrs. Marty Wolcoff. (R. 83) These conversations related to "marital difficulties at that time that they were trying to iron out while he was in prison." (R. 216-217)

In mid-1968, upon Burton Wolcoff's request, Rabbi Cohen brought a non-prescription inhalator and pills to Burton Wolcoff when a doctor was not available. (R. 182)

Concerning what acts he performed for Burton and Robert Wolcoff, Rabbi Cohen testified that "I extended to them as I did every other inmate who had a need the ultimate of my time . . . . I give the example of my concern for the inmates and their totality. I had no less or no more concern for the Wolcoffs, no less or no more." (R. 249)

Rabbi Cohen stated that he never "made any demand or request of Burton Wolcoff that unless he give you something you wouldn't let him make the telephone calls, did you, Rabbi Cohen?" (R. 221) He further stated that "at no time did Burton or Robert Wolcoff ever say to you if you let me make telephone calls to my wife I will give you something." (R. 221) At no time "was there any time of mention at that time that you can stay at the Continental Plaza in Chicago if you allow us to make telephone calls in the future." (R. 222)

> "Q. There was no condition on this at all?
> A. Definitely not." (R. 222)

The Rabbi testified that at no time did he do anything in his official capacity as Rabbi at the institution as a result of having his hotel room paid for in Chicago. (R. 225) The Rabbi was asked, "did you unlawfully agree with

Burton Wolcoff, Robert Wolcoff and Doree Wolcoff, or any of them, to corrupt yourself as a prison official?" He answered, "No, I did not." (R. 226) The Rabbi also stated that he performed no act as a result of receiving the watch. (R. 229)

Harold Kaufman, serving a thirty-year term in Terre Haute for bank robbery, was the next Government witness. He testified that in May, 1968, Burton Wolcoff told him in a conversation about an inhalator that "the Rabbi is in my pocket and he brings this in." (R. 431)

Charles Fenton, the Assistant to the Warden at Terre Haute Penitentiary in 1968 and 1969, testified that though he could not remember the words of a conversation with Burton Wolcoff in the summer of 1968, in substance Wolcoff stated that Rabbi Cohen was performing services and receiving gifts in return for those services. (R. 490)

As a witness on her own behalf, Mrs. Doree Wolcoff testified that she never intended to bribe Rabbi Cohen nor did she ever conspire with Burton or Robert or the Rabbi to bribe Rabbi Cohen. (R. 613)

REASONS FOR GRANTING THE WRIT

I.

THE CHARGES AND EVIDENCE IN THIS CASE ERRONEOUSLY EXTENDED THE SCOPE OF THE CRIME OF CONSPIRACY WHERE THE GOVERNMENT'S PROOF ESTABLISHED THAT A SPECIFICALLY NAMED CO-CONSPIRATOR/BRIBEE DID NOT CONSPIRE WITH THE DEFENDANTS TO BE INFLUENCED IN HIS OFFICIAL DUTIES.

The conspiracy count of the indictment specifically charged that the three defendants conspired and agreed together and with "unindicted co-conspirator Bernard M. Cohen" to bribe Rabbi Cohen. Cohen was a Government witness, and therefore the Government vouched for his credibility. Yet Rabbi Cohen specifically denied that he ever conspired or agreed with the defendants in this case to commit an unlawful act. Rabbi Cohen testified that none of the acts that he performed for a defendant were the result of the payment of his hotel bill or the gift of the watch. Rabbi Cohen also stated that he considered the making of the telephone calls and the giving of the inhalator and medicine to Burton Wolcoff to be perfectly proper and within his discretion in interpreting the regulations of the Penitentiary.

The evidence as to the conversations at the time that Burton Wolcoff suggested the Rabbi could be his guest in Chicago also is completely lacking in proof of the corrupt intent charged in the indictment. The conversations revealed that payment of the hotel bills would be made because of the past kindnesses of the Rabbi. The evidence indicates that at no time was a demand made by the Rabbi

or was there an offer to give gifts conditioned on future acts by the Rabbi on behalf of the Wolcoffs.

The trial court, sensing the weakness of the Government's case, summed up many of the arguments of the defendants when he stated:

> "The question is whether you can have a conspiracy at all if an unindicted conspirator is in fact not a conspirator." (R. 144)
>
> • • •
>
> "But how can they induce him to do something contrary to his duties to the government if he had no knowledge or belief that it was contrary to his duties?
>
> All they were doing was inducing him to do things which he had a perfect right to do under his understanding of the regulations." (R. 147)
>
> • • •
>
> "The Court: How can they bribe someone to do something that was perfectly legitimate? (R. 149)
>
> Well, I think the government may have a problem that I did not anticipate or realize when I was going over the indictment in the first instance because it was my understanding from the indictment that the government's evidence would show that Rabbi Cohen was just as much at fault, just as much to blame in this indictment as the defendants, and that he could have been indicted just as well as they could have. . . . It may be. But if you do not show it, I do not know whether you have got a valid indictment or a valid cause of action against the defendants." (R. 150-151)

In light of the testimony of Rabbi Cohen, the evidence is completely lacking of any proof of corrupt intent. See *U. S.* v. *Irwin,* 350 F.2d 192 (2nd Cir., 1965) where the Court stated at page 197:

> "The intent to influence, accompanying the corrupt giving or accepting of something of value, is an es-

> sential element of §201(b, c, d, e) which Congress dealt with in separate subsections, and for the violation of each of which it attached severe penalties. No similar provisions concerning corrupt giving and specific intent to influence or induce were included in §201(f, g, h, i), and the penalty provided for a violation of any of those subsections was much less severe. Obviously, Congress made a distinction between the two groups of subsections and purposely omitted from the latter group the description of the specific intent which was an essential element of the former."

This Court, in *Kotteakos* v. *U. S.*, 328 U.S. 750 (1946), struck down an attempt to expand the crime of conspiracy. This Court should be aware of the Government's attempts to make the crime of conspiracy a catch-all in the ever-widening extension of federal criminal jurisdiction.

II.

UNDER RULE 18 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, VENUE IS NOT ESTABLISHED IN SUBSTANTIVE COUNTS WHERE ONLY THE ACTS OF AN ACCESSORY OCCURRED IN THE PROSECUTING DISTRICT AND IN THE CONSPIRACY COUNT WHERE NO ACTS OF A CONVICTED DEFENDANT OCCURRED IN SUCH DISTRICT.

Defendants, Burton and Robert Wolcoff, were indicted on four counts of bribery (Title 18, §201(b)) and one count of conspiracy (Title 18, §371). The facts adduced at trial indicate that the only acts that occurred in the Northern District of Illinois wherein venue was alleged was the alleged payments of the Rabbi's hotel bills at the Continental Plaza by Doree Crews Wolcoff. At the close of the Government's case and at the close of all the evidence, the defendants moved for judgment of acquittal on the

ground that the Government failed to prove venue. (R. 532) Since the indictment properly alleged venue, and the defendants had no notice of a defect in venue until the Government rested its case without proving what it had alleged, the motion was timely. (*U.S.* v. *Bohle,* 445 F. 2d 54, (C.A. 7th, 1971) at page 58). After the verdict of not guilty as to Mrs. Doree Crews Wolcoff on the conspiracy charge, the defendants renewed their Venue Motion in the post-trial motions.

As to all counts, the evidence reveals that at all times relevant, defendants Burton and Robert Wolcoff were incarcerated in the Terre Haute Penitentiary, Terre Haute, Indiana. It was from this location that the alleged arrangements and agreement to bribe were made.

The opinion in this case at page 4 states:

> "We see no merit in the claim that venue, though properly laid in the indictment, was not proven. 'The conspiracy . . . cannot alone constitute the offense. It needs the addition of the overt act.' *Hyde* v. *United States,* 225 U.S. 347, 359 (1912). The indictment charges, as one of the overt acts, that the Rabbi made telephone calls for Burton Wolcoff from prison to Doree Wolcoff in Chicago in aid of the conspiracy. That overt act was proven and is sufficient to constitute proof of the unlawful agreement in the Northern District of Illinois. *Id.* at p. 357; *Bellard* v. *United States,* 356 F. 2d 437, 438 (5th Cir. 1966)."

This opinion relies then on a telephone call, an act done outside the prosecuting district, which was received by an alleged conspirator found by the jury to be not guilty.

Rule 18 of the Federal Rules of Criminal Procedure provides that prosecution shall be had in the District in which the offense was committed. However, it is well settled

that the mere accessorial acts of an accessory in a district wherein the principals had no contact, are insufficient to justify venue in that District. Thus, in *U. S.* v. *Bozza,* 365 F.2d 206 (2nd Cir., 1966), the Court stated:

> "While we perceive no constitutional obstacle to * * * being tried in the Eastern District for causing * * * accessorial acts there, we have been furnished with no authorities to show that the common law would have permitted this and we do not read the statute * * * as doing so. * * * Congress seems to have been content with venue where the defendant's own accessorial acts were committed or where the crime occurred, without providing still another where the accessorial acts of agents took place." (Page 221)

See also, *U. S.* v. *Flaxmore,* 304 F. Supp. 1301 (D.C.N.Y., 1969); *U. S.* v. *Mischlich,* 310 F.Supp. 669 (D.C.N.J., 1970); *U. S.* v. *Sweig,* 316 F.Supp. 1148 (D.C.N.Y., 1970).

Applying the principle of this case, it is apparent that the accessorial act of Doree Crews Wolcoff in paying the Rabbi's hotel bill in Chicago was wholly insufficient to support venue in the Northern District of Illinois on the substantive counts against Burton and Robert Wolcoff who, at all relevant times, remained incarcerated in Indiana.

As to Count I, the conspiracy count, the jury found Doree Crews Wolcoff not guilty. In *U. S.* v. *Green,* 309 F. 2d 852 (C.A. 5th, 1962), the three named defendants, along with seven others, were indicted in the Northern District of Florida. The indictment alleged twenty-three overt acts, twenty-two of which took place in the Southern District of Florida and the last act of which was alleged to have been committed in the Northern District of Florida where the indictment was brought. Upon the motion of eight of the defendants, the District Judge ordered the

cause transferred to the Southern District as to all of the defendants. At the close of the case, one of the defendants who committed no personal acts in the Southern District, requested the Court to charge the jury that in order to convict any defendant, the jury must find that the acts alleged to have taken place in the Northern District was, in fact, committed *and the defendant participated in it.* The trial court refused to do so. In holding this refusal to be error, the 5th Circuit Court of Appeals, per Judge Wisdom, said:

> "This case presents an unusual situation with regard to Venue. Had the defendants been indicted in the *Southern* District of Florida and had no mention been made of the twenty-third act, committed in the Northern District, the trial judge's instruction to the jury that '* * * it isn't necessary for the Government to prove except one overt act. * * * If you believe there is a conspiracy, then it requires one overt act,' would have been correct. The indictment was returned, however, in the *Northern* District of Florida. In order for there to have been a valid conviction, venue must be shown to have existed in the district where the prosecution was commenced.
>
> Congress has provided that '* * * any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.' 18 U.S.C.A. §3237. There is no indication that the words 'may be inquired of' are to be given any less weight than 'prosecuted in'. Unless, therefore, at least one overt act by a defendant was committed in the Northern District of Florida, the court lacked venue.
>
> This is no pedantic, justice-defeating technicality. The dangers of abuse are manifold if the Government can obtain an indictment for conspiracy in a district

> other than the district where the offense was actually committed merely by alleging that one act, ***which need never be proved,*** was committed in that district. Surely the Government should not be able to procure an indictment in Hawaii for an offense committed entirely in Alaska without having to prove to the satisfaction of a jury that at least one act was done in the district of the indictment. There is grave danger of injustice where, as in the present case, one defendant was not even alleged to have participated in the one act which occurred in the district where the indictment against him and nine others was returned.
>
> Questions of venue in criminal cases * * * are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.' United States v. Johnson, 1944, 323 U.S. 273, 276, 65 S. Ct. 249, 89 L. Ed. 236.
>
> We hold that the trial court erred in failing to submit the question of venue to the jury."

Applying the rationale of the *Green* case to the facts of the case at bar, there is a total absence of venue in the Northern District of Illinois on the conspiracy count as to defendants, Burton and Robert Wolcoff, since they had no contact with Illinois even though Doree Crews Wolcoff, who was not found to be a part of the conspiracy, committed acts in the Northern District of Illinois, since it is necessary for a *conspirator* to have committed an overt act in the District and that the other defendants participated in that act.

Under Rule 18 of the Federal Rules of Criminal Procedure, the trial court erred in failing to grant petitioners' motion for judgment of acquittal at the close of the Government's case on the ground that it failed to prove venue in the Northern District of Illinois.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request this Court grant and issue its Writ of Certiorari for review of the decision below.

Respectfully submitted,

RAYMOND J. SMITH
33 North Dearborn Street
Chicago, Illinois 60602
Attorney for petitioners.

APPENDIX

APPENDIX "A"

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 23, 1973
July 12, 1973

Before
Honorable ROGER J. KILEY, *Circuit Judge*
Honorable WILBUR F. PELL, JR., *Circuit Judge*
Honorable JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1707
vs.

BURTON SANFORD WOLCOFF, ROBERT ALLEN WOLCOFF and DOREE CREWS WOLCOFF,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois,
Eastern Division.

No. 72-CR-190

THOMAS R. MCMILLEN, *Judge*

ORDER

The indictment here charged defendants, Burton Wolcoff, Robert Wolcoff and Doree Wolcoff, in Counts II through V with the substantive offense of bribing Rabbi Bernard M. Cohen, an officer of United States prisons, with

intent to influence him in performance of his function in violation of 18 U.S.C. §201(b) (3); and in Count I with conspiracy, 18 U.S.C. §371, to commit the substantive offenses.[1] The jury found Burton Wolcoff and his brother Robert guilty as charged in the five counts, and Doree Wolcoff not guilty under Count I but guilty in the remaining four counts. All defendants have appealed. We affirm.

The facts are undisputed. In December, 1967 Burton and Robert Wolcoff were sentenced to the federal penitentiary in Terre Haute, Indiana for mail fraud. Shortly after their incarceration they attended Jewish religious services and, according to prison custom, met Rabbi Cohen. Beginning in mid-December, at Burton Wolcoff's request, Rabbi Cohen placed several collect telephone calls through the prison switchboard to Burton Wolcoff's wife, defendant Doree Wolcoff. He also placed calls for Robert Wolcoff to his wife. In mid-1968 Rabbi Cohen delivered to Burton Wolcoff, who was suffering from asthma, a commercial inhalator and medication, left at the Rabbi's home by Doree Wolcoff.

In March, 1968 Rabbi Cohen was required to take his son, who was ill, to Chicago. Reservations for them had been made when they arrived at the Continental Plaza Hotel, and Doree Wolcoff later paid the bill. In October, 1968 Doree Wolcoff again paid Rabbi Cohen's bill at the same hotel for another stay, and later that same month presented him with a $220.00 watch.

Burton and Robert Wolcoff contend that the evidence did not prove the elements of the conspiracy charged against them.

---

[1] Rabbi Cohen was named in an overt act in Count I as an "unindicted co-conspirator."

The Rabbi was a government witness and denied that his services to the Wolcoffs were sought or induced by the payment of his hotel bills, and the watch. He testified that his services to them were comparable to similar services by other prison chaplains to other prisoners; that the prison switchboard was aware of the telephone calls; and that the services were proper under his interpretation of prison regulations, "which he had never seen." Burton and Robert Wolcoff argue that the government had vouched for his testimony which shows no corrupt intent on their part, but merely a reward for "past kindnesses," and that the government should not have been permitted to impeach its own witness. We reject the Wolcoff's contention. The traditional rule against impeaching one's own witness is losing its strength. See, *e.g.*, *United States* v. *Freeman*, 302 F.2d 347, 351 (2nd Cir. 1962), which noted its "pernicious" illness.

This Circuit relied upon the *Freeman* case in *United States* v. *Jannsen*, 339 F.2d 916 (7th Cir. 1964). In *Jannsen* Judge Swygert (now Chief Judge), writing for the court, justified departure from the "fundamental rule" against impeachment of one's own witness.

Since the government was free to impeach Rabbi Cohen's testimony, the jury was free to discredit it. The jury presumably rejected the pertinent testimony of Rabbi Cohen and could properly have done so upon consideration of other evidence tending to prove the conspiracy. It could have viewed Rabbi Cohen's "interpretation" of regulations "he had never seen" as incredible and have disbelieved his testimony that the hotel expenses and the watch were unconnected with the services performed by him for Burton and Robert Wolcoff.

We take the testimony most favorable to the government in deciding whether the evidence of conspiracy was sufficient: Burton Wolcoff persuaded Rabbi Cohen to make the calls to Doree Wolcoff. He, presumably, had Rabbi Cohen request Doree Wolcoff to deliver the inhalator and medicine to the Rabbi's home for delivery to Burton Wolcoff. Burton Wolcoff also caused Doree Wolcoff to arrange hotel accommodations on two occasions for Rabbi Cohen and to pay the bills, and to present him with a $220.00 watch. The jury could conclude this conduct was aimed at influencing Rabbi Cohen to violate his function as prison chaplain, as charged in the indictment.

The evidence also discloses that Robert Wolcoff was present at phone calls made by Rabbi Cohen for his brother Burton and present during all conversations with Rabbi Cohen. Rabbi Cohen also made calls for Robert Wolcoff to his wife. Furthermore, Robert Wolcoff told a fellow prisoner "the Rabbi belongs to us," and in his presence Burton Wolcoff told another prisoner "the Rabbi is in my pocket." Finally there is testimony that Robert Wolcoff told a prison official that the Rabbi was performing illegal services for rewards and gifts and showed the official copies of checks which supported the statement.

It was sufficient proof of the criminal conspiracy that Burton and Robert Wolcoff knew they were bribing Rabbi Cohen to violate prison rules of which, presumably, they must have known. And the criminal agreement is of course inferable from circumstances. *United States* v. *Fellabaum*, 408 F.2d 220, 224 (7th Cir. 1969). There was ample proof of the conspiracy as to Burton and Robert Wolcoff and of the commission by Rabbi Cohen and Doree Wolcoff of the overt acts charged in the indictment.

We see no merit in the claim that venue, though properly laid in the indictment, was not proven. "The conspiracy . . . cannot alone constitute the offense. It needs the addition of the overt act." *Hyde* v. *United States*, 225 U.S. 347, 359 (1912). The indictment charges, as one of the overt acts, that the Rabbi made telephone calls for Burton Wolcoff from prison to Doree Wolcoff in Chicago in aid of the conspiracy. That overt act was proven and is sufficient to constitute proof of the unlawful agreement in the Northern District of Illinois. *Id.* at p. 357; *Bellard* v. *United States*, 356 F.2d 437, 438 (5th Cir. 1966).

Finally, the Wolcoffs contend that the district court erred in denying their motion to dismiss on the ground that the 2½ year delay in indicting them violated their rights to speedy trials under the Sixth Amendment. We find the preindictment delay did not violate the Sixth Amendment, *United States* v. *Marion*, 404 U.S. 307 (1971); *United States* v. *DeTienne*, 468 F.2d 151 (7th Cir. 1972); *United States* v. *White*, 470 F.2d 170 (7th Cir. 1972), absent a showing of substantial prejudice avoiding the *Marion* rule. The Wolcoffs' reliance on *Dickey* v. *Florida*, 398 U.S. 30 (1970), is misplaced, since the facts in that case clearly distinguish it from the case before us.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 27, 1973

No. 72-1707

Before

Honroable ROGER J. KILEY, *Circuit Judge*

Honorable WILBUR F. PELL, JR., *Circuit Judge*

Honorable JOHN PAUL STEVENS, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

BURTON SANFORD WOLCOFF, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.

72 CR 190

McMILLEN, *Judge*

IT IS HEREBY ORDERED that the petition for rehearing filed in the above entitled appeal, be and the same is hereby, DENIED.

SUPREME COURT, U. S.

No. 73-366

FILED

OCT 30 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

BURTON SANFORD WOLCOFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-366

BURTON SANFORD WOLCOFF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence was insufficient to establish a conspiracy and that venue was improper.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners Burton and Robert Wolcoff, inmates of the federal penitentiary at Terre Haute, Indiana, were convicted of conspiring to defraud the government of the faithful services of Rabbi Bernard M. Cohen, an officer of the United States (Rabbi Cohen was a prison chaplain), in violation of 18 U.S.C. 371. In addition all three petitioners were convicted of four counts of bribing the chaplain, in violation of 18 U.S.C. 201(b)(3). Burton was sentenced to three years' imprisonment; all but six months and one day were suspended, and

he was placed on probation for the balance of the term. Robert and Doree received three year sentences, which were suspended in favor of probation, and each was fined $2,500. The court of appeals affirmed on July 12, 1973, and denied rehearing on July 27, 1973. The petition for a writ of certiorari was not filed until August 28, 1973, and is therefore out of time under Rule 22(2) of this Court.

In any event, the petition is without merit. Petitioners contend that their convictions are not supported by the evidence because the chaplain, who testified as a government witness, denied that the favors he had done for Burton and Robert were induced by the gratuities he had received (Pet. 7-9). They also maintain that venue in the Northern District of Illinois was not proper. The sufficiency of the evidence contention was fully considered and correctly rejected in the opinion of the court of appeals (see Pet. App. 3-4), upon which we rely. The court of appeals also correctly rejected the contention that venue was improper (see Pet. App. 5); in addition to the telephone calls of which the court took note, payment of the chaplain's hotel bills, which formed the basis for the substantive counts and constituted overt acts of the conspiracy, occurred in the Northern District of Illinois.[1]

---

[1] Petitioners rely upon *United States* v. *Bozza*, 365 F. 2d 206, 221 (C.A. 2), for the proposition that venue did not lie in the district where the hotel bills were paid (Pet. 11). The payment of those bills, however, was not, as in *Bozza*, merely "accessorial acts;" rather, "the crime occurred" when and where the bills were paid.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCOBER 1973.